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INFORMATION,

For Sir William Ker of Green-head, and the other
Creditors of Harwood,

Against

The Children of the Deceast Alexander Paterson.

SIR William Ker of Greenhead and others, being Cautioners for Harwood in the Sum of 10000 lib. Harwood the Principal granted them an Heritable Bond of Relief, whereupon they were Infest in May, 1681.

Harwood becoming Debitor to Alexander Paterson, he granted him an Heritable Bond in August, the same year 1681. after the Infestment of Relief.

Harwoods Estate being sold by Roup, there is a debate for preference betwixt the base Infestment for relief, and the posterior Infestment of Annualrent in favours of Paterson, whose Children crave to be preferred, because the Infestment of Annualrent though base, and posterior in date, yet it was first clad with Possession: In so far as there is produced an Antapocha by Harwood the Debitor, acknowledging the receipt of a Discharge of a Terms Annualrent; likewise there is produced a Decree of Poynding of the Ground.

It was Answered, both Instructions of the Annualrenters Possession are most suspect, and no ways probative. For 1. The Antapocha is only the Deed of the Debitor after he was broken, and not to be regarded. 2. The Decree which followed, is for Poynding of the Ground for the same Terms Annualrent that the Antapocha mentions, to be discharged. 3. The Decree is vitiating in the Decernitor particularly in these words, *For the Terms of Martinis last bypast.*

But suppose the Instructions of Possession were good, Greenhead and the other creditors do chiefly insist upon this Ground, that an Infestment of Relief is a compleat and valid Right from the date, and needs no Possession to compleat because an Infestment of Relief can never be presumed to be fraudulent, but carries the Instruction of an Onerous Cause along with it; For without a distress executed, it can never be effectual: And the presumption of Fraud and Lasciviousness of other base Infestments, not clad with Possession, is the reason why posterior Publick Infestments are preferred to them; and that reason ceasing, Infestments of Relief are compleat Rights from their date; and for the same reason

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son, Infestments of Warrantice are reckoned effectual and valid without Possession.

It was Answered, That Law and Custom hath cleared, that base Infestments are not regarded as compleat Rights, till they be Confirmed by Possession: And there is no distinction in Law or Practique betwixt base Infestments of Relief and others. And it hath been particularly decided in the case of *Ingliston contra Tennents of East-Barns*, June 26. 1677. That Infestments of Relief were not compleat or valid from their date, but only according to their Possession. 2. There is a great difference betwixt an Infestment of Warrantice, and an Infestment of Relief; For an Infestment of Warrantice is valid and confirmed by the Possession of the Principal Lands.

It was replied, That base Infestments are not reckoned valid without Possession, which was introduced, more by Custom and uniform practice, than by any positive Law, and that custom being found inconvenient, is corrected by a late Act, whereby all Infestments duly Registrat, are equally valid from the date, & it is certain, that where a Law is introduced by uniform Custome and Practice, it goes no further than the Practice doth reach; and it cannot be pretended that Practice hath cleared the case of Infestments of Relief to require Possession; For all the Precedent condescended upon, is a single Practique, and to eleid that, there are two more solemn Practiques in the contrair, viz. Monsieur Somerdyk against the Creditors of Kincardine, and another in the Competition of the Creditors of Clackmannan, so that nothing can be founded upon Practice.

2. Neither can any thing be alledged upon the Analogy, betwixt Base Infestments of Relief, and other base Infestments, because there is a vast disproportion betwixt the two; other base Infestments are in Practice presumed fraudulent, so long as they are not made publick by Possession, or otherways, whereas Infestments of Relief cannot admit of Possession until Distress.

3. There is a perfect Analogie and Proportion betwixt Infestments of Relief and Infestments of Warrantice, both are granted for Security in a certain Event, and neither are proper Titles of present Possession, and uniform Decisions, have cleared that Infestments of Warrantice, are valid without Possession, and there is no reason to difference the one from the other.

4. As to the Practique, *Ingliston contra the Tennents of East-barns*. It varys materially from this Case; For that was the Case of a Competition of two base Infestments of Relief, and both of them did provide present access to the Meals and Duties that the Receiver of the said several Infestments might have in their own hands to relieve themselves, whereby these Infestments were present Titles of Possession, whereas this Infestment of Relief, is merely an Infestment for Security, and equivalent to an Infestment of Warrantice, and did not afford a present Title of Possession; and therefore there was good reason to consider the Infestment of Relief mentioned in that Practique, as in the same Case with other base Infestments, because, the speciality that differ-
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ences Infestments of Relief from others, is, That not being present Titles of Possession, there arises no Presumption of Fraud from the want of Possession.

The Precise ground upon which *Greenhead* founders, being that the nullity of base Infestments is chiefly introduced by Custome which by no precedent hath been extended to such Infestments as that now in the Field; That Position is yet further clear, by 105. *Act Parliament 1540.* Which gave the first rise to annull base Infestment, which *Act* proceeds from a Narrative of Fraud, by Disposing Lands formerly Disposed to Baitns, or Friends, or others: And therefore it is Ordained, that who sells Lands, or Annualrents, and puts others in privat State thereof, not by Resignation, or Confirmation, that the Person who gets the Land, and bruiks the same peaceably year and day, and so is known Heretale Possessor thereof, year and day, the Person having privat State and Seisin, shall never be heard to claime the same against the second Heretale Possessor.

This *Act* Relats chiefly to the Disposition of Lands, and respects no Possession, but a continued Possession year and day, and being made before the *Act* of Parliament 1617 Requiring the Registration of Seasins, it became a very useless *Act*, and there was no reason to Extend it beyond the precise Terms of it; because the Reason of the Law was, that Purchasers could not know private Infestments, which Reason ceased by the Registration of Seasins, and no Seisin in publick Register, could be properly called *latent*, notwithstanding in Practice not only Heretale Possessors, year and day. But Annualrenters, who had either received payment of Annualrent privately from the Debitor, or had used a Citation against him, were reckoned to have made their base Infestments publick by Possession, to the exclusion of anterior Infestments, which Custome was introduced ~~without~~ any Foundation, either in Law or Reason such Possessions not being regarded by the foresaid *Act* of Parliament, but only continued Possession, neither did the *Act* of Parliament regard Possession of Annualrenters, but what Custome Introduces, is not to be contraverted, only such a Custome not being founded upon Reason, and abrogated by an express *Statute*, it ought not to be extended to any Circumstance beyond the custome, and it cannot be pretended, there is any uniform custome, requiring Possession to validate Infestments of Relief: But the Custome is rather on the contrary, and more expressly in the parallel case, of an Infestment of Warrantice.

And whereas, it is alledged, that the Reason why Infestments of Warrantice require no Possession, is, because Possession of the principal Lands is reckoned Possession of the Warrantice.

It is Answered, The matter of Fact is clear, and acknowledged, That Warrantice requires no Possession; and it is altogether denied, that the Possession of the principal Lands is the reason, for that is a meer fictitious Possession, without any Foundation in Reason, unless it be, that the Warrantice cannot be possest till eviction, and in that case, is parallel with an Infestments

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of Relief, and the Decision of the one should regulate the other.

2 It is true in the case, *Brown contra Scot 9th January 1666*. Where Infestment of Warrantice is sustained without Possession. It is remarked, That the Infestmen of Warrantice was in the same Session with the Infestment of the principal Lands, and that the principal Lands were possest. But it was found upon the 20th January 1668. *Forbes contra Innes*, That a base Infestment of Warrantice granted *ex intervallo* after Infestment, and Commencement of Possession of the principal Lands, was valid, and preferable to a posterior publick Infestment, which pratique wants the speciality of being in the same Paper, or validat by Possession of the principal Lands, which were not possest by that Infestment, and the only remaining Reason for sustaining the Infestment of Warrantice was, and could be no other than the same was no Title of Possession till eviction.

In Respect whereof, The base Infestment of Reli fough to be preferred

Infestment for
Brown Scot of
Grosgrange
The Plaintiff of Brown
has pillar Pond

Philip Laugh
esq: report